SERVED: November 30, 1995

NTSB Order No. EA-4407

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 20th day of November, 1995

DAVID R. HINSON, Administrator, Federal Aviation Administration, Complainant, v. ALEX BUTCHKOSKY, Respondent.	Docket SE-12680 RM

OPINION AND ORDER

Respondent has appealed from the oral initial decision of Administrative Law Judge William A. Pope, rendered on January 24, 1995, following an evidentiary hearing held the previous day.[1] The law judge affirmed the Administrator's order revoking any and all airman certificates held by respondent, finding violations of sections 61.15 and 67.20(a)(1) of the Federal Aviation

[1]An excerpt from the hearing transcript containing the initial decision is attached.

Regulations ("FAR," 14 C.F.R. Parts 61 and 67).[2] For the reasons that follow, we deny respondent's appeal and affirm the order of revocation.

Both parties had stipulated to several facts. First, that on September 22, 1989, respondent was convicted in the United States District Court, Southern District of Florida, of 1) conspiracy to import marijuana, in violation of 21 U.S.C. § 963; 2) importation of marijuana, in violation of 21 U.S.C. §§ [952(a)][3] and 960(a)(1); and 3) possession with intent to distribute marijuana, in violation of 21 U.S.C. § 841(a)(1). Second, that respondent, on September 26, 1989, filed an appeal with the United States Court of Appeals for the Eleventh Circuit

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[2]These regulations state, in pertinent part:

§61.15 Offenses involving alcohol or drugs.

(a) A conviction for the violation of any Federal or state statute relating to the growing, processing, manufacture, sale, disposition, possession, transportation, or importation of narcotic drugs, marihuana, or depressant or stimulant drugs is grounds for --

* * * *

(2) Suspension or revocation of any certificate or rating issued under this part.

§ 67.20 Applications, certificates, logbooks, reports, and records: Falsification, reproduction, or alteration.

(a) No person may make or cause to be made --
(1) Any fraudulent or intentionally false statement on any application for a medical certificate under this part.

[3]There was a typographical error on the stipulation. However, reference to the judgment, Exhibit R-4, reveals that the correct citation is as noted above.

from the judgment of conviction and sentence, but that respondent served notice to dismiss the appeal on May 4, 1990, pursuant to an agreement with the United States.[4] Third, on his March 22, 1990 application for a pilot medical certificate, respondent answered "no" to the question of whether he ever had or has now any record of other convictions. And last, that on November 28, 1991, respondent filed a motion under 28 U.S.C. § 2255 to vacate his conviction.[5] (Ex. J-1.)

In Administrator v. Butchkosky, NTSB Order No. EA-4229 (1994), the Board reversed the law judge's grant of summary judgment on the 67.20(a)(1) charge and determined that, given this decision, it would be appropriate to give respondent the opportunity to present evidence and argument on the 61.15 sanction issue. At the hearing, considerable testimony was elicited detailing the circumstances surrounding respondent's conviction and the extent of his involvement in the drug smuggling operation. After sifting through all the circumstances that culminated in respondent's arrest, the law judge determined

[4]The appeal was dismissed on May 8, 1990. (Ex. R-6.)

[5]Section 2255 provides a statutory remedy for collateral attack on judgments of sentence after conviction, but such an attack is not part of the original criminal prosecution. Under section 2255, a sentencing court may discharge or resentence a defendant if the court determines it did not have jurisdiction to impose the sentence, the sentence was in excess of the maximum authorized by law, or the sentence is otherwise subject to collateral attack. Grounds for collateral attack are narrowly limited to claims of a constitutional violation, that the sentence exceeded the statutory limits, or a fundamental error of fact or law that made the proceeding irregular or invalid. See U.S. v. Addonizio, 442 U.S. 178, 99 S.Ct. 2235, 2241 (1979).

that respondent "knowingly participated in a criminal enterprise for economic gain" and that conduct was egregious enough to demonstrate a disregard for the lives of others and a lack of qualifications to hold an airman certificate. (Initial Decision at 278.) He also determined that respondent made an intentionally false statement on his medical application.[6]

On appeal, respondent argues that he was not involved in a drug conspiracy for economic gain, but rather, only played a peripheral role in the criminal conspiracy for which he was convicted. This argument is unavailing, however, as the Board will not entertain a collateral attack on respondent's conviction. See Administrator v. Pimental, NTSB Order No. EA-4382 at 3, n. 3 (1995) (this is not the appropriate forum for a challenge of a respondent's conviction); Administrator v. Gilliland, NTSB Order No. EA-4149 at 4, n. 7 (1994). The Administrator, in his discretion, may suspend or revoke an airman's certificates under FAR section 61.15(a) for a conviction of a drug-related offense. Precedent certainly supports revocation for a conviction for offenses, not involving an aircraft, that pertain to the importation and distribution of illegal drugs. See, e.g., Pimental, supra; Administrator v.

[6]The law judge found that, because respondent may have received erroneous advice from a representative of the Aircraft Owners and Pilots Association (AOPA) as to how to answer a question about convictions, see infra, n. 10, that the falsification violation, standing alone, would only support a revocation of his medical certificate and a suspension of his pilot certificate. (Initial Decision at 270.) We disagree with this determination and, although we affirm the final disposition of the case, do not affirm the decision on this point.

Johnson, NTSB Order No. EA-3929 at 8 (1993), and cases cited therein. Respondent's protestations that he merely played a peripheral role in the drug conspiracy are of no moment. His conviction in federal district court for offenses related to the importation and distribution of over 6,000 pounds of marijuana fully resolved, for our purposes, the question of his guilt or innocence of those federal felonies, and it is evidence enough that he lacks the requisite care, judgment, and responsibility of a certificate holder. Further inquiry into the underlying facts of his conviction is unnecessary and inappropriate.

Respondent also contends on appeal that the law judge erred in finding that he intentionally made a false statement on his March 1990 medical application regarding his record of convictions.[7] While he acknowledges that an intentionally false statement is a false statement, in reference to a material fact, made with knowledge of its falsity, Hart v. McLucas, 535 F.2d 516 (1976), he argues that he did not possess the requisite intent to falsify, but, instead, was simply uncertain as to what answer he should give on the application.[8] This, he maintains, is not "guilty knowledge."

[7]He further asserts that the law judge has created a new standard that requires an airman to seek advice from the FAA if he is unsure of the correctness of his response. We find his assertion unjustified. The law judge's suggestion that respondent could have put to rest any uncertainty over how to respond to the question created no new standard. It merely noted the single most forthright option available to the respondent for correctly filling out an FAA form.

[8]The falsity and materiality of respondent's statement is evident and not in dispute.

The Administrator presented a prima facie case of intentional falsification which respondent was called upon to rebut. After hearing respondent's explanation, the law judge made a credibility assessment against him, finding that he knew the answer he had put on his medical application was false.[9] In Administrator v. Robbins, NTSB Order No. EA-4156 (1994), the respondent was also charged with intentionally falsifying his medical application by failing to admit that he had a drug conviction. Regarding that falsification, we noted that "[t]he issue for us, on review, is not whether other conclusions are possible, but whether there is sufficient basis to discard the law judge's conclusion." Id. at 8. Such is the situation in the case at hand. The law judge found that respondent knew he had been convicted on three counts of drug-related crimes and that he knew convictions had to be reported on his medical application.

Respondent claims that a representative from AOPA advised him that he did not have to report the conviction on his application while the conviction was on appeal and that the law judge erred by not recognizing it as evidence that he did not have the intent to provide false information on his medical application. Again, this decision involved a credibility determination. The law judge gave little weight to the affidavit from an AOPA employee which stated that "members with criminal

[9]The law judge found, "from Respondent's own testimony, that he was aware of both his convictions and the apparent requirement that he report it on his medical certificate application." (Initial Decision at 268.)

convictions seeking information in and around 1989 and 1990, may have been advised that if their conviction was on appeal, it was not reportable on the FAA medical application forms then in use as a 'conviction.'" (Ex. R-2.) By concluding that respondent engaged in "forum shopping" to find the advice he liked best, the law judge determined that respondent did not honestly believe that he had no criminal convictions when he completed his application for a medical certificate.[10] We will not disturb a

[10]Respondent testified about omitting the reference to his criminal convictions as follows:

> Prior to going for my medical, I just checked all around with all the other airmen, checked different attorneys and tried to determine whether, as my appeal was pending, how I should answer this.
>
> So I called the A.O.P.A. I called them on one occasion and I talked to a girl there and I told her the situation. I told her that I had been convicted, but I had an appeal pending and how do I answer that airman's certificate for the medical?
>
> Well, real quick she just came right out and says oh, absolutely, you must put no on there because if you put yes on, the first thing they'll do is they'll come and they'll take your license, revoke your license.
>
> And she said, it will be real tough for you to try to get your license back. And as long as your appeal's pending, you win your appeal, then you know, your record will be expunged.
>
> So I thought that was pretty good....

(Tr. at 73-74.)

Respondent further testified that he called AOPA back the next day and spoke to someone else who confirmed the advice he had been given. He stated that, based on this advice, he answered "no" on his medical application. (Tr. at 75.) At no time did he state that, at the time he filled out the application for a medical certificate, he honestly believed that he did not have a criminal conviction.

law judge's credibility finding unless it was made in an arbitrary or capricious manner. Administrator v. Smith, 5 NTSB 1560, 1563 (1987).

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied; and

2. The Administrator's order and the initial decision are affirmed.

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT and GOGLIA, Members of the Board, concurred in the above opinion and order.

(..continued)

An argument could be made that, if respondent had not intended to provide false information on his medical application and truly believed he was under no obligation to report the conviction to the FAA while his appeal was pending, then, presumably, he would have informed the Administrator of the conviction in May 1990 when he voluntarily dismissed his appeal. We note that there is nothing in the record to suggest that respondent tried to amend his application upon dismissal of his appeal.